U.S. 586 (1950), that the FCC has no jurisdiction over contractual rights involving private property. Under Section 303, the Commission may not regulate the real estate industry as such and may regulate building owners only to the extent they subject themselves to the Commission's jurisdiction by voluntarily providing telecommunications services or facilities.[18] In fact, even the Commission's authority over telecommunications companies is limited. See Bell Atlantic, 24 F.3d 1441. Significantly, Section 207 omits any invocation of the Commission's so-called implied powers under Section 4(i) of the Act.

The Commission has no general authority to implement a particular government policy not committed to it by Congress. NAACP v. Federal Power Comm'n, 425 U.S. 662, 669 (1976) (federal agency does not have "a broad license to promote the general public welfare"). An agency can only implement those policies that can be advanced through regulation of entities subject to its statutory jurisdiction. Therefore, even if Section 207 actually supported the broad policy that the satellite industry and others would wring out it (which it does not), the Commission

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[18] This is not a case in which property owners are seeking benefits within the Commission's jurisdiction. In 47 C.F.R. § 73.635, by contrast, the Commission states that it would not be in the public interest to grant a television license to an applicant that owns, leases or controls an antenna site that is not available to other users, if no other comparable site is available. In that case, the Commission is exercising jurisdiction not over a property owner as owner of the site, but over an applicant for a Commission-issued license irrespective of site ownership.

could only implement that policy (if it existed) by regulating telecommunications service providers and their facilities. The Commission has no authority whatsoever to impose an affirmative obligation on building owners or anyone else to begin providing communications services to their tenants, occupants, or residents.

Perhaps the Commission might have the authority to establish an obligation to provide "reception service" on building owners who were holding themselves out to the public as providing telecommunications services. In that case they would be akin to common carriers, having voluntarily subjected themselves to the Commission's jurisdiction. NARUC v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1976). But building owners as such do not hold themselves out to the public as providing telecommunications services. Indeed, since they enter into individually negotiated agreements based on "individualized decisions," id., they are clearly outside the scope of the Commission's jurisdiction over providers and the Commission cannot impose such obligations.

C. Section 207 Does Not Apply to Commercial, Income-Producing Properties.

Regardless of what rights Section 207 may or may not confer, those rights are limited to privately-owned residential premises. There is no evidence whatsoever to support the argument that Congress meant to include any commercial, income-producing properties, including office buildings, shopping centers, apartment buildings and other rental real estate, within the scope of Section 207. What Congress meant to do in enacting

Section 207 was to allow individual property owners -- people who own their own residences -- to circumvent restrictions that limit their ability to enjoy the full benefits of owning that property. The text of Section 207 and the legislative history support this conclusion in two ways.

First, the use of the term "viewers" -- so heavily relied on by the Commission and the telecommunications industry -- clearly implies residential use. The additional term "video programming services" strengthens this implication because it refers primarily to the programming, and hence the personal use, of television. Thus, restrictions on the use of nonresidential property are outside the reach of Section 207.

Second, the legislative history refers exclusively to a category of restrictions all of which apply to individuals who own their own residences. Congress spoke of preempting zoning laws, homeowners' association rules and restrictive covenants because they were perceived to prevent individual property owners from receiving certain signals -- but Congress said nothing about apartment leases or other restrictions that affect individuals who do not own the premises they occupy. Almost universally, zoning for multiple housing and non-residential income-producing uses is distinct in purpose and effect from zoning applicable to residences. Therefore, under a fair reading, rental properties of all kinds, other than perhaps single-family dwellings, are not covered by Section 207.

The Commission's new rule already addresses the non-income-producing properties intended to be covered by Section 207. In fact, the Commission itself recognized the distinction between leased and owned properties in issuing the FNPRM. Only the specific types of restrictions mentioned in the legislative history -- zoning laws, homeowners' association rules, and restrictive covenants -- are covered by the Commission's new rule, with good reason. Income-producing properties clearly fall into a different category and outside the category of restrictions subject to Section 207. Therefore, the Commission should not venture across that line to regulate restrictions on income-producing properties.

Finally, we note that the FNPRM itself states that the Commission's new rules apply only to *reception* devices.[19] Therefore, we presume that antennas used for data and voice *transmission* are also excluded from the scope of the FNPRM, and are not within the scope of the current rule or any action contemplated by the Commission.

D. The Commission Has Neither the Statutory Authority Nor the Funding To Effect a Taking.

1. Congress Did Not Give the Commission the Power of Eminent Domain.

As we have discussed in our earlier filings, the Congress did not confer the power of eminent domain on either the Commission or its regulatees. In Bell Atlantic, the D.C. Circuit declared that where an administrative application of a statute

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[19] FNPRM at ¶ 61, n.180.

constitutes a taking for an identifiable class of cases, the courts must construe the statute to avoid such constitutional claims wherever possible. The court further made clear that such a narrow construction of the laws is designed to prevent encroachment on the exclusive authority of Congress over appropriations.

2. Any Commission Attempt to Condemn Private Property Would be Unlawful under the Anti-Deficiency Act.

Even if the Commission had Congressional authorization to effect a taking in this instance, any such taking would be unlawful under the Anti-Deficiency Act because Congress has not appropriated funds to compensate property owners. The Anti-Deficiency Act, as codified in part at 31 U.S.C. § 1341, provides that no officer or employee of the United States Government may

> (A) make or authorize an expenditure or obligation exceeding an amount available in appropriation or fund for the expenditure or obligation; or
>
> (B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

Id.

As discussed in our earlier filings,[20] the purpose of the Anti-Deficiency Act is to keep all governmental disbursements and obligations for expenditures within the limits of the amounts appropriated by Congress. The government's obligations include amounts due as compensation for Fifth Amendment takings.

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[20] Joint DBS Comments at 9-11.

Any rulemaking that would expose the Government to paying Fifth Amendment claims subjects the Government to the kind of open-ended liability that has been rejected by the Comptroller General and the courts as a violation of the Anti-Deficiency Act. Therefore, unless Congress appropriates the necessary funding, any regulation that effects a taking will likewise violate the Anti-Deficiency Act.

III. MANDATING RECEPTION FOR ALL POTENTIAL SUBSCRIBERS WOULD RAISE NUMEROUS TECHNICAL AND PRACTICAL PROBLEMS.

There are sound and persuasive reasons why the Commission should not attempt to regulate the placement of antennas on private property, even if it had jurisdiction to do so. As we described in our Joint DBS Comments and elsewhere, such Commission regulation would raise a vast number of new and often complex issues for the Commission and building owners to deal with. The result would be enormous expense for the real estate industry, and a regulatory morass beyond the Commission's expertise, capacity, or experience.

Some of these potential difficulties, already discussed elsewhere, include resolving maintenance problems and safety and security concerns, assuring compliance with building and electrical codes, coordinating the needs of different tenants and service providers, properly allocating costs, and in general overseeing the efficient day-to-day operations of hundreds of thousands of buildings.[21] The validity of these concerns is

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[21] Joint DBS Comments at 14-22.

affirmed by the procedures for antenna placement on federal property recently established by the General Services Administration.[22]

In the discussion that follows, we offer additional examples of the practical difficulties associated with any new regulation in this area.

A. Granting An Individual Right to Install Antennas Would Be Unworkable.

We ask the Commission simply to consider a few of the issues that would arise out of an attempt to force building owners to allow their tenants, occupants and residents to install antennas. First are the issues arising out of an individual right limited to installing antennas within the premises demised in a particular lease.

What will happen if residents of a unit with multiple tenants desire to subscribe to more than one service, or if each wants to subscribe to a different service? Will the owner be forced to allow the installation of two or more antennas outside a single unit?

Who will be liable if one of the many antennas required to be installed falls and injures a passerby? While the telecommunications industry claims that the firm that installed the antenna would be liable, in fact, owners and managers of real estate are the more likely targets of the resulting litigation. The building owner generally will have greater financial

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[22] 61 Fed. Reg. 14100 (Mar. 29, 1996).

resources than the installer, particularly if installation is done by an independent contractor, and will be easier to find if the accident occurred a considerable time after installation. In addition, who will be liable if a tenant personally installs the antenna? Regardless of who is actually at fault, building owners will be sued, and many will be held liable for the acts of others.

One example of the many ways in which this issue may arise is the case of an apartment building owner in Kansas, who reports that a resident has attached a DBS antenna to a length of 2" x 4" lumber. The resident has installed the antenna by closing the window on the end of the 2" x 4" with the antenna outside, using a counterweight and the pressure of the sash to hold the antenna and the 2" x 4" in place. See Exhibit A. This is hardly a practical or safe installation method -- but what authority will building owners have to regulate such activities if the Commission preempts all of the restrictions on such actions in their leases?

Similarly, will building owners be able to control who goes up on their roofs and walls to install antennas? Or will such decisions be left entirely to the discretion of the resident requesting the service? Can the building owner exclude an incompetent installer chosen by the tenant on the basis of the lowest price?

Will a tenant who requests installation of an antenna bear all the costs of installation and maintenance? If so, what

happens if the antenna is a fixture under state law and the tenant wishes to remove the antenna to take to his next location? Is the Commission prepared to preempt state laws in this regard?

B. Requiring the Installation of a Common Antenna to Serve Multiple Tenants or Occupants Is Impracticable.

Many residents, tenants or occupants may find that an individual right to receive services does them little good, because the physical location of their premises does not permit reception of the desired signals. Tenants in multiple housing certainly have no greater rights than dwellers in single family housing, who are limited to the metes and bounds of their individual premises. One proposal for dealing with this situation would require building owners to allow the placement on their premises of common antennas to service multiple residents. As we commented earlier, the Commission has no authority to require building owners to make such services available to their residents, tenants and occupants. Therefore, the Commission could not adopt a regulation that would require building owners to become SMATV operators against their will, or to allow service providers onto their premises without violating the Fifth Amendment.

In addition, even if a regulation were constitutionally permissible and within the Commission's statutory authority, a common antenna rule would raise additional issues, such as: Who will bear the cost of installing and maintaining antennas and wiring? How many competing operators must be allowed in? What if different residents, tenants or occupants want equivalent

service from different providers? The answers to all of these questions will greatly affect a building operator's costs and, perhaps the economic viability of a particular building. It is not difficult to create a hypothetical scenario in which a small building that provides its owner a minimal return on investment could become unprofitable because the owner had to install facilities to deliver multiple services to different tenants.

In addition, requiring residents, tenants or occupants, rather than building owners, to bear the cost of installing common antennas and related facilities is no more likely to succeed. Again, in the case of small buildings, especially those serving low income areas, the cost per resident, tenant or occupant of installation of a common antenna could be prohibitively high. The Commission cannot force tenants to pay for making the common service available. Either tenants, residents or occupants will voluntarily have to pay the cost directly, in which case not many will request service, or rents will have to go up sharply across the board to pay for the new facilities. As a result, some residents, tenants or occupants would be forced to move into less desirable space, and building owners would be forced to incur additional costs to find new residents, tenants or occupants -- assuming they could be found at the new rental rates.

In short, any proposal requiring the installation of common antennas would present a number of practical difficulties and costs, in addition to profound legal problems.

C. It Would Be Impractical for the Commission to Become the Adjudicator of Thousands of Disputes Over the Interpretation of the Terms of Leases and Similar Real Estate Agreements.

The real estate industry has already demonstrated both its concern over this issue, and the difficulties Commission regulation could raise. In the space of a few weeks prior to the release of the FNPRM, the Commission received upwards of 430 requests from building owners and managers asking for the Commission's views regarding the effects of the prior proposed rule on their leases. See, FNPRM at Attachment B. The potential number of questions and disputes far exceeds that number. If the Commission adopts a rule that impinges on the relationship between property owners and their tenants, occupants and residents, thousands of disputes will arise and the Commission will repeatedly be called upon to review the leases and similar real estate agreements and to decide how they are affected by the new rules. In addition, many of these cases will go to court for resolution. It is unwise and impractical for the Commission to embark on a scheme of regulation that will require it to adjudicate so many individual disputes. We urge the Commission to recognize the legal and practical limits of its authority and proceed no further with this matter.

IV. MANDATING ACCESS IS UNNECESSARY BECAUSE THE MARKET IS ADDRESSING THE PROBLEM.

Building owners benefit from satisfied residents and profitable tenants and occupants. Consequently, they have an incentive to establish policies that promote the well-being of

all tenants and residents. The real estate market is already responding to customer demand for telecommunications services.[23]

In short, the members of the associations constituting the joint commenters are fully capable of meeting their obligations to their occupants, tenants and residents. As keen participants in an extremely competitive marketplace, they will continue to ensure that occupants, tenants and residents have the services they need. The Commission's policy goals will best be met by allowing the private market to respond to competitive demands and grow naturally. It is unnecessary for the Commission to interject itself in this field, and in the end any action it may take is likely to prove counterproductive.

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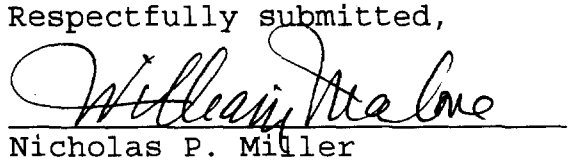
[23] See, e.g., Decl. of Stanley Saddoris, attached as Exhibit B to Joint DBS Comments.

Conclusion

The Commission should recognize (1) that it lacks the power under Section 303 of the Act to prohibit property owners from controlling the placement of antennas (i) on multi-tenant property subject to leases and similar revenue-producing real estate agreements and (ii) in common areas, (2) that it lacks jurisdiction to compel landlords gua landlords to themselves provide reception services to their tenants, and (3) that there are sound and persuasive reasons why the Commission should not preempt these private, non-governmental relationships.

Respectfully submitted,



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September 27, 1996

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EXHIBIT A

The Curtin Company

September 20, 1996

Jim Arbury
National Multi Housing Council
Suite 540
1850 M Street, NW
Washington, DC 20036

Re: Satellite Issue

Dear Jim,

Enclosed please find the pictures related to the satellite issue currently facing our properties and other multi-family properties across the nation.

We have requested that this tenant remove the satellite from the apartment for the following reasons:

Per Lease: Tenant shall make no alterations, repairs, decorations, additions or improvements in or to the premises without Landlord's prior written consent, and then only by contractors or mechanics approved by the Landlord. (Note: The tenant did not seek or receive prior written consent to install the satellite.)

Per Lease: Tenant shall keep the part of the premises that such Tenant occupies and uses as clean and safe as the condition of the premises permit; (Note: We have very sincere safety concerns of what may happen if the satellite were to fall on a person walking below the satellite.)

Per Rules and Regulations: Windows and doors shall not be obstructed. ....any damages will be repaired or removed by Tenant or at Tenant's expense. (Note: Obviously there have been some modifications done to the window, the screen is missing and the window is obstructed.)

Per Rules and Regulations: No radio wires, television, or other aerials or any other objects whatsoever shall be attached to the roof or exterior of any building. (Note: We feel the satellite is a television aerial.)

Jim, our Property General Manager has requested the tenant remove the satellite based upon the lease and the rules/regs. The tenant argues that he has mounted the dish on a 2 X 4 board that is hung suspended outside his window and has no holes or damage to the

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exterior. He has counterbalanced the weight of the satellite dish on the 2 X 4 board on the interior of the apartment. He feels he has complied with our rules and regulations by not drilling or damaging the exterior of the building.

Our position is that the weight or wind resistance of a satellite and the quality of installation may create maintenance problems and -- more importantly -- a hazard to the safety of residents, building employees, and passers-by. Damage to the property caused by water seepage into the building could create safety hazards and very costly maintenance and repair. This is only one example on a property of 360 apartments. The problems related to satellites increase dramatically with additional satellites of different sizes, colors, shapes and installation methods.

In conclusion, we feel the FCC should not extend regulations implementing Section 207 of the Telecommunications Act of 1996 to situations in which the viewer does not have exclusive use or control and a direct ownership interest in the property where the antenna is to be installed, used and maintained. There are many factors such as safety, security, aesthetics, liability, and insurance costs that a private property owner must consider and manage on a day-to-day basis. All of these factors are vital to the operation of an apartment community.

All of the potential problems we cite will adversely affect the safety and security of our properties as well as our bottom line and our property rights. Please express our concerns to the FCC.

Sincerely,

Rick Mann

Rick Mann
Vice President
The Curtin Company